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No. 655

In the Supreme Court of the United States

OCTOBER TERM, 1958

BEACHVIEW BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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Opinions Below

The opinion of the court of appeals (App. 183a-186a) has not yet been reported. The decision of the Federal Communications Commission (App. 73a-166a) and its memorandum opinion denying rehearing (App. 166a-171a) are not officially reported, but are unofficially reported at 11 Pike and Fischer, Radio Reg. 939 (1956). The memorandum opinion denying reopening of the record (App. 171a-181a) is reported at 22 F.C.C. 989 (1957).

Jurisdiction

The judgment of the court of appeals was entered on September 18, 1958 (App. 186a). A petition for rehearing en banc was denied on October 22, 1958 (App. 187a). The petition for certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the court of appeals applied the proper standards of review in affirming the Federal Communications Commission's action in a comparative proceeding for a permit to construct a new commercial television station.

Statutes Involved

Pertinent provisions of the Communications Act of 1934 and the Administrative Procedure Act are set forth in the petition (Pet. 3-5).

Statement

Petitioner and Tidewater Teleradio, Inc. (then known as "Portsmouth Radio Corporation") were competing applicants in a comparative proceeding seeking award of a construction permit for a new commercial television station to operate on Channel 10 in Norfolk-Newport News-Portsmouth, Virginia. After a lengthy hearing, the Hearing Examiner issued an Initial Decision favoring a grant to the petitioner, Beachview. The Examiner favored Beachview because he believed it demonstrated superior integration of ownership with management and because he thought Portsmouth's voting trust [illegible]

trary to the public interest (App. 1a-53a). He believed the voting trust, under which Portsmouth's 61 stockholders had placed management control of the station in eleven of their number, was bad "as a matter of principle", despite his finding that the trustees were "worthy of the highest trust. Their stature in the area is indisputable. It is likewise apparent that they would do a good job in the management of the station" (App. 51a). His conclusion on integration was that Beachview was superior "numerically and stockwise" (App. 52a).

After oral argument on exceptions to the Initial Decision, the Commission reversed the Examiner and granted Portsmouth's application. In summarizing its conclusions, the Commission said (App. 105a):

> On the basis of the points of preference asserted by the parties, Portsmouth prevails in the only two in which comparative differences are found—civic participation and past broadcast record. Portsmouth's overall record in the operation of Station WAVY does lend some additional assurance of effectuation of its proposals made herein. On one other factor, diversification of communications interests, not asserted by Beachview, we have found a minor preference for Beachview. Crediting this preference to Beachview, we are of the view that Portsmouth is nevertheless comparatively superior and is the applicant more qualified to bring a television service in the public interest.

The Commission found that the voting trust, which "may be revoked by majority vote of the deposited shares", was not contrary to the public interest or to

the Commission's prior decisions and concluded that creation of the voting trust did not indicate that the non-voting stockholders "regard the proposed station solely as a business investment to the exclusion of the public interest" (App. 152a). On the question of integration of ownership and management, the Commission found Beachview's quantitative advantages, relied upon by the Examiner, to be balanced by the more significant quality of Portsmouth's integration (App. 149a). In denying rehearing, the Commission reaffirmed its views on these matters (App. 166a-181a).

The court of appeals, in a *per curiam* opinion, affirmed the Commission's decision. The court pointed out that the Commission had compared the two applicants on the "various bases specified by the parties as applicable points of comparison"; that there was voluminous evidence on each point; and that the Commission had discussed each point and stated its reasoning thereon "at length." The court found that the Commission's action had not been "arbitrary, capricious, irrational or unreasonable" (App. 184a-185a). It said that Congress had confided in the Commission the function of evaluating competing applicants and that it is "not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved" (App. 185a). It concluded finally that the Commission's findings complied in all respects with the standards previously announced by the court. Judge Edgerton, concurring, stated that, while he thought the Hearing Examiner and the

minority of the Commission were "right" in preferring Beachview, he could not say there was no rational basis for preferring Portsmouth (App. 186a).

ARGUMENT

Certiorari is sought on the ground that the court of appeals failed to exercise the review responsibilities imposed upon it. Petitioner contends that the court determined only that the Commission's decision was "internally consistent" and did not consider whether the weight or significance attached to particular criteria was consistent with the Commission's decisions in prior comparative proceedings. Nothing in the opinion below supports that contention. The court found simply that the Commission's application of its established criteria to the facts of this case was not "arbitrary, capricious, irrational or unreasonable".

Examination of recent actions of the court below in reviewing Commission decisions in comparative hearings discloses no abdication of its review powers. In three recent cases, for example, the court reversed the Commission's decision for an incorrect application of comparative criteria. *Sunbeam Television Corp.* v. *Federal Communications Commission*, 243 F.2d 26; *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 237 F.2d 552; *WLOX Broadcasting Company* v. *Federal Communications Commission*, 260 F.2d 712.

Petitioner's argument appears to be based upon its mistaken belief that the numerous factors considered

in determining which of several applications for broadcast facilities would best satisfy the "public interest, convenience and necessity" are capable of being given precise meaning and weight applicable in all situations. The public interest does not admit of such an algebraic formulation. See *Easton Publishing Company* v. *Federal Communications Commission*, 175 F.2d 344 (C.A.D.C.) Circumstances which are of critical import in one fact situation may be of much less significance in others. Thus, the Commission had a right to conclude that petitioner was entitled to only a minor preference on the ground of diversification of communications media. While petitioner owned no other communications media in the area and Portsmouth owned a local radio station, there were seven other radio stations and four other television stations in the area. This situation is obviously to be distinguished from one where an applicant owns the community's only newspaper or the only (or dominant) local radio station, where concentration of control is of much greater significance.

Moreover, as the court below has previously pointed out, the Commission's view as to the weight to be given particular factors may legitimately change as, for example, where conditions in the broadcasting industry have changed. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 230 F.2d 204, certiorari denied, 350 U.S. 1007. As this Court has stated:

"* * * [W]e cannot say that the Commission is bound by anything that appears before us to deal with all

cases at all times as it has dealt with some that seem comparable." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228.

In sum, the court of appeals' recognition in this case of the broad authority given to the Commission in applying the public interest standard to licensing proceedings raises no question that is either novel or of general importance. See *Federal Radio Commission*, v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 275-277.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1959.